Cheow Tong Chai & Anor v Tan Boon Lieu & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–23–14 OF 2002
AZIAH ALI J
25 NOVEMBER 2009

Tort — Malicious prosecution — Elements to be proved in action for malicious prosecution — Application for leave to commit plaintiffs to prison on plaintiffs' failure to comply with interim order for stay — Whether application amounted to malicious prosecution — Whether defendants acted with malice — Whether damage caused to plaintiffs by defendants' action

The first, second and third defendants were the chairman, the honorary secretary and vice-chairman respectively of the Selangor and Kuala Lumpur Foochow Coffee Bar and Restaurant Merchants' Association ('the association'). The plaintiffs who were also members of the association alleged that the appointment of the first and second defendants as members of the executive committee of the association for the year 2000–2001 was invalid. The plaintiffs argued that they and 41 others were the rightful office bearers of the association and that the first, second and third defendants and 40 others were not. On 11 July 2007, the plaintiffs commenced an application for a declaration that they were the rightful office bearers of the association for the year 2000–2001. On 19 March 2001 the plaintiffs obtained the order sought. However, on 4 April 2001 the plaintiffs' solicitors discovered certain errors in the sealed order and applied to amend the order. On 24 April 2001, the defendants filed an application for a stay of execution of the order dated 19 March 2001. On 2 May 2001, the defendants were granted an interim stay order pending the hearing of the plaintiffs' application to amend the order. The defendants then alleged that the plaintiffs had given a press conference which was duly published in the *China Press* claiming that the interim stay order did not exist. The defendants then filed an ex parte motion for leave to commit the plaintiffs to prison for contempt of court on the grounds that the plaintiffs had not complied with the interim order of stay. The court made no order on this application and the defendants subsequently withdrew the motion. The plaintiffs now claim that the defendants' motion for leave to commit the plaintiffs for contempt of court was malicious and unfounded and was initiated for the sole purpose of damaging and humiliating the plaintiffs' reputation in the eyes of the Foochow clan at large. Hence the present application by the plaintiffs against the defendants for malicious prosecution. The plaintiffs pleaded that such committal proceedings had interfered with the plaintiffs' reputation and liberty and also subjected the plaintiffs to public scandal, odium and

contempt and thus sought special and general damages with interest and costs. In response the defendants alleged that had instituted committal proceedings against the plaintiffs on the grounds that the plaintiffs had given a statement to the *China Press* on 4 May 2001 stating that there was no order for stay when there was an interim stay order. The defendants therefore claimed that their sole purpose in filing the motion for contempt of court was to enforce the stay order and bring to the attention of the court the disrespect shown by the plaintiffs towards the interim order dated 2 May 2001. The defendants also submitted that the plaintiffs had failed to prove malicious prosecution. The sole issue for the court was whether the defendants' action in filing the motion for leave to commit the plaintiffs to prison for contempt of court amounted to malicious prosecution.

Held, dismissing the plaintiffs' claim with costs:

(1) The plaintiffs' own evidence was inconsistent with their case as pleaded Although the court had made an interim order dated 2 May 2001 to stay the execution of the order obtained by the plaintiffs on 19 March 2001, pending the plaintiffs' application to amend the order, the plaintiffs pleaded in para 10 of their statement of claim that there was no such order to stay. The existence of the interim order of stay dated 2 May 2001 militates against the plaintiffs' claim that the court had not made any such order (see para 24).

(2) The defendants had reasonable cause to take action based on what was published in the *China Press* on 4 May 2001. Further, the fact that there was no evidence of malice is irrelevant if reasonable and probable cause is established. As such the plaintiffs had not discharged their burden of proof that the defendants had acted without reasonable or probable cause and with malice (see para 27).

(3) In any event the plaintiffs' claim for malicious prosecution was not maintainable without proof of damage caused to the plaintiffs. There was no evidence produced by the plaintiffs to support their claim for damages. There was also no evidence of the plaintiffs being injured by the ex parte application (see paras 28 & 29).

[Bahasa Malaysia summary

Defendan-defendan pertama, kedua dan ketiga adalah masing-masing pengerusi, setiausaha kehormat dan timbalan pengerusi 'Selangor and Kuala Lumpur Foochow Coffee Bar and Restaurant Merchants' Association' ('persatuan tersebut'). Plaintif-plaintif yang juga ahli persatuan tersebut mendakwa bahawa pelantikan defendan-defendan pertama dan kedua sebagai ahli-ahli jawatankuasa eksekutif persatuan tersebut untuk tahun 2000–2001 adalah tidak sah. Plaintif-plaintif menghujah bahawa mereka dan 41 orang yang lain adalah ahli-ahli sah persatuan tersebut dan defendan-defendan

pertama, kedua dan ketiga dan 40 yang lain bukan ahli yang sah. Pada 11 Julai 2007, plaintif-plaintif memulakan satu permohonan untuk deklarasi bahawa mereka adalah ahli persatuan yang sah bagi tahun 2000–2001. Pada 19 Mac 2001 plaintif-plaintif memperoleh perintah yang dipohon. Walau bagaimanapun, pada 4 April 2001 peguam cara plaintif-plaintif menyedari kesilapan tertentu di dalam perintah termeterai dan memohon untuk meminda perintah tersebut. Pada 24 April 2001, defendan-defendan memfailkan permohonan untuk menggantung pelaksanaan perintah bertarikh 19 Mac 2001. Pada 2 Mei 2001, defendan-defendan diberikan perintah penggantungan interim sementara menunggu perbicaraan permohonan plaintif-plaintif untuk meminda perintah tersebut. Defendan-defendan kemudian mendakwa bahawa plaintif-plaintif telah membuat sidang akhbar yang telah diterbitkan di dalam akhbar *China Press* mendakwa bahawa perintah penggantungan interim tidak wujud. Defendan-defendan kemudian memfailkan usul ex parte untuk kebenaran untuk memasukkan plaintif-plaintif ke penjara bagi penghinaan mahkamah atas alasan bahawa plaintif-plaintif tidak mematuhi perintah interim untuk penggantungan. Mahkamah tidak membuat perintah atas permohonan ini dan defendan-defendan kemudian menarik balik usul. Plaintif-plaintif kini mendakwa bahawa usul defendan-defendan untuk kebenaran menahan plaintif-plaintif untuk penghinaan mahkamah adalah berniat jahat dan tidak berasas dan adalah dimulakan semata-mata untuk merosakkan dan memalukan reputasi plaintif-plaintif di mata kaum Foochow. Maka permohonan ini oleh plaintif-plaintif terhadap defendan-defendan untuk pendakwaan salah. Plaintif-plaintif memplid bahawa prosiding penahanan telah mengganggu reputasi dan kebebasan plaintif-plaintif dan juga mendedahkan plaintif-plaintif kepada skandal umum, perasaan benci dan penghinaan dan oleh itu memohon ganti rugi khas dan am dengan faedah dan kos. Sebagai jawapan defendan-defendan menyatakan bahawa prosiding penahanan yang dimulakan terhadap plaintif-plaintif atas alasan-alasan bahawa plaintif-plaintif telah memberikan kenyataan kepada *China Press* pada 4 Mei 2001 menyatakan bahawa tidak ada perintah untuk penggantungan apabila terdapat perintah penggantungan interim. Defendan-defendan oleh itu menyatakan bahawa satu-satunya tujuan memfailkan usul untuk penghinaan mahkamah adalah untuk melaksanakan perintah penggantungan dan membawa kepada pengetahuan mahkamah sikap tidak hormat yang ditunjukkan oleh plaintif-plaintif terhadap perintah interim bertarikh 2 Mei 2001. Defendan-defendan juga menghujah bahawa plaintif-plaintif telah gagal membuktikan pendakwaan dengan niat jahat. Satu-satunya isu untuk mahkamah adalah sama ada tindakan defendan-defendan memfailkan usul untuk kebenaran untuk memasukkan plaintif-plaintif ke penjara untuk penghinaan mahkamah membentuk pendakwaan dengan niat jahat.

Diputuskan, menolak tuntutan plaintif-plaintif dengan kos:

(1) Keterangan plaintif-plaintif sendiri tidak konsisten dengan kes mereka

seperti yang diplid. Walaupun mahkamah telah membuat perintah interim bertarikh 2 Mei 2001 untuk penggantungan pelaksanaan perintah yang diperoleh oleh plaintif-plaintif pada 19 Mac 2001, sementara menunggu permohonan plaintif-plaintif untuk meminda perintah tersebut, plaintif-plaintif memplid dalam perenggan 10 pernyataan tuntutan mereka bahawa tidak ada perintah sedemikian untuk penggantungan. Kewujudan perintah interim untuk penggantungan bertarikh 2 Mei 2001 menjadi penghalang terhadap permohonan plaintif-plaintif bahawa mahkamah tidak membuat perintah sedemikian (lihat perenggan 24).

(2) Defendan-defendan mempunyai alasan yang munasabah untuk membawa tindakan berdasarkan apa yang diterbitkan di dalam *China Press* pada 4 Mei 2001. Selanjutnya, fakta bahawa tidak ada keterangan dengan niat jahat adalah tidak relevan jika sebab yang munasabah dan berkemungkinan dibuktikan. Oleh itu plaintif-plaintif tidak melepaskan beban pembuktian bahawa defendan-defendan telah bertindak tanpa sebab yang munasabah dan berkemungkinan (lihat perenggan 27).

(3) Walau bagaimanapun, tuntutan plaintif-plaintif untuk pendakwaan dengan niat jahat tidak boleh dikekalkan tanpa bukti kerugian yang dialami oleh plaintif-plaintif. Tidak ada keterangan yang diberikan oleh plaintif-plaintif untuk menyokong tuntutan mereka untuk ganti rugi. Juga tidak ada keterangan plaintif-plaintif mengalami kerugian oleh permohonan ex parte tersebut (lihat perenggan 28 & 29).]

Notes

For cases on malicious prosecution generally, see 12 *Malall's Digest* (4th Ed, 2005 Reissue) paras 688–705.

Cases referred to

Anne Lim Keng See v The New Straits Times Press (M) Bhd & Anor [2008] 3 MLJ 492, CA (refd)

Herniman v Smith [1938] AC 305, HL (refd)

Hicks v Faulkner (1878) 8 QBD 167 (refd)

Lim Chee Kuo v The Pacific Bank Bhd [1999] 1 CLJ 270, HC (refd)

Nicholls v Ely Beet Sugar Factory Ltd [1936] Ch 343, CA (refd)

Rawther v Abdul Kareem [1966] 2 MLJ 201, FC (refd)

Tempest v Snowden [1952] 1 KB 130 (refd)

Uda Holdings Bhd (formerly known as Perbadanan Pembangunan Bandar) v Melewar Leisure Sdn Bhd (formerly known as Harta Bumi Sdn Bhd) [2009] 2 MLJ 408, HC (refd)

ST Lee (S T Lee & Partners) for the plaintiffs.

MS Murthi (Murthi & Partners) for the first, second and third defendants.

Aziah Ali J:

[1] By way of this action the plaintiffs claim against the first, second and third defendants damages for malicious prosecution as follows:

(a) Against the defendants for damages:

(i) Special damages for RM45,000:

(A) RM10,000 for appearing to defend the application for leave for committal;

(B) RM10,000 for filing application to set aside the notis usul dated 15 June 2000;

(C) RM25,000 for filing writ of summons for damages.

(ii) General damages amounting to RM2m (including aggravated and exemplary damages) in respect of the malicious prosecution filed by the defendants on 15 June 2001 in the High Court at Kuala Lumpur for leave to commit the plaintiffs to prison for contempt of court.

(b) Interest of 8%pa on the sum awarded in (a) above from the date of judgment to the date of realisation.

(c) Costs, and

(d) Any other reliefs which the honourable court deems fit to grant.

[2] The claim against the fourth and fifth defendants had been withdrawn.

BACKGROUND

[3] The plaintiffs and the defendants are members of the Selangor and Kuala Lumpur Foochow Coffee Bar & Restaurant Merchants' Association ('the association'). The first defendant was the chairman and the second and third defendants were the honorary secretary and vice chairman of the association.

[4] On 11 July 2000 the association held an election for the executive committee for the year 2000–2001. The plaintiffs say that they and 41 others were the lawfully elected committee members. However the first defendant had a recount of the votes and declared himself and 40 others as lawfully elected committee members for 2000–2001. The plaintiffs alleged that the appointment of the first and second defendants as members of the executive committee to the association for the year 2000–2001 was invalid.

[5] On 11 July 2000 the plaintiffs filed the Originating Summons No R2–24–42 of 2000 ('the OS suit') against the defendants wherein the plaintiffs sought a declaration that they are the true and rightful office bearers of the association and that the first, second and third defendants and 40 others were not the rightful office bearers of the association. On 28 November 2000 the plaintiffs had also filed an ex parte summons in chambers to restrain the defendants from holding the annual dinner of the association.

[6] On 19 March 2001 the plaintiffs obtained the orders sought for in both the OS suit and the summons in chambers. On the same date the plaintiffs took steps to take possession of the association's premises.

[7] On 4 April 2001 the plaintiffs' solicitors received the two sealed orders dated 19 March 2001 but found errors in both orders. Both parties attended a meeting with the deputy registrar and the plaintiffs' solicitors admitted the errors and undertook to file an application to amend the orders.

[8] On 24 April 2001 the defendants filed a summons in chambers for a stay of execution of the two orders dated 19 March 2001. On 2 May 2001 counsel for the plaintiffs and the defendants attended the hearing of the defendants' application for stay. The defendants obtained an interim stay order pending the hearing of the plaintiffs' application to amend the orders which was fixed for hearing on 21 May 2001 (bundle B1 pp 1–2A).

[9] The defendants alleged that the plaintiffs gave a press conference which was duly published in the *China Press* on 4 May 2001 claiming that the interim stay order did not exist. The plaintiffs also caused an advertisement to be published in *Nanyang Siang Pau* newspaper informing members of the association that there would be a members' general meeting on 27 May 2001. The plaintiffs had also attempted to operate the association's accounts. The defendants alleged that the plaintiffs' actions showed that the plaintiffs' refused to comply with the interim stay order dated 2 May 2001.

[10] Due to the plaintiffs' actions, on 15 June 2001 the first, second and third defendants filed an ex parte Originating Motion No R2–25–62 of 2001 ('originating motion') for leave to commit the plaintiffs to prison for contempt of court for not complying with the interim order of stay granted by the court on 2 May 2001. In their statement in support of their ex parte application for leave, the defendants alleged that in a press conference with the *China Press* on 4 May 2001, the plaintiffs/respondents had made several statements as follows:

... such stay order did not exist at all
The Plaintiffs suspect the truth of such order
The Court did not issue the stay order
The object of such press conference was to clarify the issue of the 'false' stay order.

[11] The defendants alleged that the said article read as a whole:

(a) scandalises this honourable court;

(b) is calculated to excite prejudice against the applicants;

(c) is challenging the authority of this honourable court; and

(d) is calculated to portray a false and misleading picture.

[12] On 19 June 2001 the court made no order on the application. The defendants subsequently withdrew the originating motion.

THE PLAINTIFFS' CASE

[13] The present suit arises out of the defendants' action under the said originating motion. The plaintiffs claim that the defendants' allegations in their statement in support of their ex parte application for leave were unfounded and malicious. The plaintiffs aver that for the purpose of obtaining leave of the court to commit the plaintiffs to prison, the defendants have smeared the plaintiffs by alleging that the plaintiffs have intentionally refused and defaulted to obey the interim stay order granted by the court on 2 May 2001. The plaintiffs further aver that for the purpose of prosecuting the plaintiffs, the defendants made serious and malicious allegations against the plaintiffs in their affidavit by presenting and producing untrue and malicious statements to court for the purpose of obtaining leave to commit the plaintiffs to prison without reasonable and probable cause.

[14] The plaintiffs allege that the defendants were reckless and vicious in not checking whether on 2 May 2001 the court had granted the interim stay order. It is the plaintiffs contention that the motives and intentions of the defendants are malicious and ill-founded for the sole purpose of committing the plaintiffs to prison for contempt of court with a view to damage and humiliate the plaintiffs' reputation in the eyes of the Foochow clan at large. The plaintiffs further claim that such committal proceedings not only was an interference with the plaintiffs' reputation and liberty but has also subjected the plaintiffs to public scandal, odium and contempt.

THE DEFENDANTS' CASE

[15] The defendants contend that the plaintiffs knew of the interim stay

order dated 2 May 2001 and its effect as shown by the letter from the plaintiffs' solicitors to the defendants' solicitors dated 2 May 2001 (bundle B1 pp 4–5). The defendants claim that the sole purpose in filing the originating motion was to enforce the order and to bring to the attention of the court the defiance and disrespect shown by the plaintiffs towards the interim order dated 2 May 2001. It is the defendants' contention that the plaintiffs' conduct in publishing the matter in the newspaper resulted in scandalising the honourable court.

[16] Counsel submits that the plaintiffs have failed to prove malicious prosecution (*Clerk & Lindsell on Torts* (19th Ed) at p 972). It is submitted that contrary to the plaintiffs' pleaded case, there is an interim order for stay dated 2 May 2001. The plaintiffs refused to accept service of the interim stay order. On 21 May 2001 and 22 May 2001 the plaintiffs caused advertisements to be published in the *Nanyang Siang Pau* regarding the holding of the association's 38th First Members' General Meeting. The interim order for stay was served on the plaintiffs' solicitors on 24 May 2001. Counsel submits that though the plaintiffs obtained the declaratory order that they are the true and rightful office bearers of the association, the interim order for stay has the effect similar to that of an injunction and therefore the plaintiffs cannot conduct the affairs of the association pending appeal.

[17] It is submitted that the ex parte application for leave was made for the purpose of enforcing the stay order. Therefore the action was not without reasonable and probable cause. Further the application was ex parte and had not yet been served. There was no likelihood of the plaintiffs being sent to prison. Counsel submits that there is no evidence at all of malice on the part of the defendants in taking such action.

DECISION

[18] The issue before the court is whether the defendants' action in filing the ex parte application for leave to commit the plaintiffs to prison for contempt of court on the ground that the plaintiffs did not comply with the interim order for stay dated 2 May 2001 amounts to a malicious prosecution.

[19] In the case of *Lim Chee Kuo v The Pacific Bank Bhd* [1999] 1 CLJ 270 it was held that the elements that need to be proved by a plaintiff in an action for malicious prosecution are:

(a) the prosecution by the defendant of a criminal charge against the plaintiff;

(b) the proceedings were terminated in the plaintiff's favour;

(c) the defendant instituted the proceedings maliciously;

(d) there was absence of reasonable and probable cause; and

(e) that the plaintiff had suffered damage.

[20] What amounts to malice was explained in the Court of Appeal case of *Anne Lim Keng See v The New Straits Times Press (M) Bhd & Anor* [2008] 3 MLJ 492 as follows:

> What is malice? According to *Osborn's Concise Law Dictionary* (7th Ed) the word 'malice' means:
>
> > Ill-will or evil motive: personal spite or ill-will is sometimes called actual malice, express malice, or malice in fact. In law an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (*Horrocks v Lowe* [1972] 1 WLR 1625). Malice in the law of tort is a constituent of malicious prosecution, defamation, malicious falsehood, and conspiracy. But an act otherwise legal is not made wrongful by an improper motive (*Mayor of Bradford v Pickles* [1895] AC 587).

[21] On what is 'reasonable and probable cause', in *Rawther v Abdul Kareem* [1966] 2 MLJ 201 the Federal Court referred to the definition by Hawkins J in *Hicks v Faulkner* (1878) 8 QBD 167 at p 171 which was approved by the House of Lords in *Herniman v Smith* [1938] AC 305 at p 316 as follows:

> I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

[22] The defendants say they took action to commit the plaintiffs on the ground that the plaintiffs gave a statement to the *China Press* on 4 May 2001 stating that there was no order for stay. The defendants contend that there was a stay order, albeit an interim one.

[23] The first plaintiff ('PW1') in his evidence said the court did not grant a stay of the two orders (see answer 11 of the first plaintiff's witness statement exh P1). The first plaintiff further said 'There was no stay order. It was an interim stay until the amendment of the orders in which the court had fixed the date for hearing of the amendment on 21st May 2001' (see answer 12 of the first plaintiffs witness statement exh P1). The second plaintiff in his

witness statement (exh P2) said 'No, we did not hold any Press Conference for any publication in respect of this matter. When the reporter from China Press approached us we did tell them that the defendants did obtained an interim order until application of our amendment was heard' (see answer No 13 of exh P2).

[24] I find that the plaintiffs' own evidence is inconsistent with their case as pleaded. Contrary to their averments in the statement of claim, it is an undisputed fact that on 2 May 2001 the court had made an interim order to stay the execution of the two orders obtained by the plaintiffs on 19 March 2001 pending the plaintiffs' application to amend the two orders. On 4 May 2001 when the plaintiffs made the statement to *China Press*, the interim order was in force. Therefore the plaintiffs were obviously wrong when they pleaded in para 10 of the statement of claim as follows:

> The Defendants in their further statements that the plaintiffs should be committed to prison for not obeying or in comply with the interim order of stay granted by the Court on 2nd May 2001. *It was in fact the Court did not make any order to that effect*. (Emphasis added.)

[25] The existence of the interim order for stay dated 2 May 2001 militates against the plaintiffs' claim in para 10 of the statement of claim that the court had not made any such order.

[26] In *Rawther v Abdul Kareem* the Federal Court said:

> Now it well settled that in an action of this nature the onus lies on the plaintiff to show that the prosecution of which he complains was instituted without reasonable and probable cause. The matter was thus stated by Brett MR in the case of *Abrath v North Eastern Railway Co* (1883) 11 QBD 440 at p 448; 11 App Cas 247:
>
> > it is not enough for the plaintiff to show, in order to support the claim which he has made, that he was innocent of the charge upon which he was tried; he has to show that the prosecution was instituted against him by the defendants without any reasonable or probable cause and with a malicious intention in the mind of the defendants, that is, not with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of fact. It has been decided over and over again that all these points must be established by the plaintiff and that the burden of each of them lies upon the plaintiff.

[27] In the present case I find that the defendants had reasonable cause to take action based on what was published in the *China Press* on 4 May 2001. There was no evidence to suggest that what was published in the *China Press* was erroneous or untrue. Therefore I find that the plaintiffs had failed to show that the defendants had no reasonable and probable cause in making

the application for leave to commit the plaintiffs for contempt of court. There is no evidence of malice. In any event malice is irrelevant if reasonable and probable cause is established (*Tempest v Snowden* [1952] 1 KB 130). On the evidence I find that the plaintiffs have not discharged the burden of proof that the defendants acted without reasonable or probable cause and with malice.

[28] In the event that I am wrong in my finding that the plaintiffs had failed to prove malicious prosecution, on the issue of damages, it is trite that damages must be proved. There is no evidence produced by the plaintiffs to support their claim for damages. In the case of *Uda Holdings Bhd (formerly known as Perbadanan Pembangunan Bandar) v Melewar Leisure Sdn Bhd (formerly known as Harta Bumi Sdn Bhd)* [2009] 2 MLJ 408 the court referred to the case of *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343 (CA). In that case, Lord Wright MR, writing for the court, said at p 351:

> The cases in which actions are not maintainable without proof of actual damage, that is to say, where damage is the gist of the action, and where the cause of action is not complete without proof of damage, fell into a different category. The most obvious and familiar is an action for negligence regarded as an independent tort; *malicious prosecution* is another; so also conspiracy to injure and deceit and, subject to certain exceptions, slander. In all these cases there is no actionable wrong unless damage has been caused to the plaintiff by what has been done or omitted.

[29] I take note that the application by the defendants was ex parte. It had not been served. There was no requirement for the plaintiffs' counsel to be present. The application was subsequently withdrawn. There is no evidence in what way the plaintiffs had been injured by the ex parte application.

[30] For the aforementioned reasons the plaintiffs' claim was dismissed with costs to the defendants to be taxed.

Plaintiffs' claim dismissed with costs.

Reported by Kohila Nesan